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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 CLAIRE BRANDMEYER, individually and on
behalf of all others similarly situated,

17
18 Plaintiff,

19 v.

20 THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

21 Defendant.
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Case No. 3:20-CV-02886-SK

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR
CONSOLIDATION, BIFURCATION,
AND APPOINTMENT OF INTERIM
CLASS COUNSEL FOR THE FEE
TRACK AND THE TUITION TRACK**

Date: June 22, 2020
Time: 9:30 a.m.
Courtroom: C, 15th Floor
Judge: Hon. Mag. Sallie Kim

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MEMORANDUM OF POINTS AND AUTHORITIES

The Regents of the University of California (“The Regents” or “the University”)¹ hereby specially appears² to respond to Plaintiffs’ Motion for Consolidation, Bifurcation, and Appointment of Interim Class Counsel for the Fee Track and the Tuition Track (“the Motion”).

I. INTRODUCTION

It feels like ages ago that employees went to work, kids boarded school buses, and athletes played organized sports. COVID-19 has upended every aspect of our lives. And it happened fast. Quite literally overnight, competitions were canceled, restaurants were shuttered, and thriving metropolises came to a screeching halt. Adaptation followed. Companies scrambled to transition to remote working infrastructures, restaurants shifted exclusively to takeout and delivery, and “Zoom” became a part of our everyday vernacular. Universities, of course, were not immune. When the alarm sounded, their first priority was student health and safety. They immediately devised and executed exit plans to relieve congestion and curtail spread of the novel Coronavirus. Simultaneously, to continue facilitating the student educational experience, they swiftly shifted to online teaching platforms and adapted to remote delivery of student services. Execution of those plans was no easy undertaking. It required securing new technological resources, revamping pedagogical models, and positioning professors for distance teaching, all at a significant financial cost. These extraordinary efforts are ongoing at universities nationwide.

Less than a month after the Coronavirus pandemic hit the United States and state and local governments began issuing shelter-in-place and similar orders, plaintiffs’ lawyers began filing

¹ Under Article IX, Section 9 of the California Constitution, “The Regents of the University of California” is the corporation granted with “full powers of organization and government” to administer the University of California and, because “The Regents” is the shorthand name for that entity, we employ the name here as a singular noun.

² The Regents is entitled to Eleventh Amendment immunity from litigation in federal court, *Regents of the University of California v. Doe*, 519 U.S. 425 (1997) and *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836 (9th Cir. 1997); by making this special appearance, it does not intend to waive that immunity. “[W]aiver of the Eleventh Amendment will only be found ‘where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.’” *Peralta v. California Franchise Tax Bd.*, 124 F. Supp. 3d 993, 999 (N.D. Cal. 2015), *aff’d*, 673 F. App’x 975 (Fed. Cir. 2016) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)); *see also Singleton v. Univ. of California*, Case No. C–93–3496 MHP, 1995 WL 16978, at *3 (N.D. Cal. Jan. 6, 1995) (finding that the University of California’s failure to raise Eleventh Amendment immunity until after filing its answer did not constitute waiver).

1 class action lawsuits seeking a return of students' tuition and fees from the nation's top
 2 universities. More than 100 such actions are now pending in state and federal courts nationwide.
 3 Three of these cases—*Brandmeyer*, *Ritter*, and *Lee*—were filed against The Regents in the
 4 Northern District of California. Mot. at 2:21-24-3:1-8.³

5 Apparently in a hurry to secure lead-counsel status, Plaintiffs Brandmeyer and Ritter
 6 (collectively, "Plaintiffs") moved this Court to consolidate the actions, bifurcate them, and
 7 approve interim appointment of class counsel. Plaintiffs press this Motion despite knowing that
 8 the University is a state actor, and therefore immune from suit in federal court. Counsel for The
 9 Regents have informed counsel for Plaintiffs that the Regents does not intend to waive Eleventh
 10 Amendment immunity, and that subject matter jurisdiction is lacking under 28 U.S.C.
 11 § 1332(d)(5). As explained in greater detail below, the case law on this score is as well-settled as
 12 it could possibly be. *See, e.g., Regents of the University of California v. Doe*, 519 U.S. 425
 13 (1997); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836 (9th Cir. 1997); *Serrano v. 180*
 14 *Connect, Inc.*, 478 F.3d 1018, 1021 n.3 (9th Cir. 2007). Accordingly, The Regents's counsel first
 15 asked Ms. Brandmeyer's counsel to agree either to dismiss her case and refile it in state court or
 16 to postpone the hearing on this Motion until such time as The Regents's motion to dismiss could
 17 be heard. Ms. Brandmeyer's counsel declined, insisting that this Motion be heard first. Mr.
 18 Ritter's counsel originally asked whether The Regents would waive Eleventh Amendment
 19 immunity and, if not, offered to dismiss and refile in state court. Since then, however, Mr.
 20 Ritter's counsel has withdrawn that proposal, and, as of the date of this filing, is giving further
 21 consideration to the matter in light of the University's refusal to waive immunity.

22 By contrast, counsel for Plaintiff Lee—who was excluded as a proposed designated class
 23 counsel in the Motion—voluntarily dismissed the *Lee* Complaint that was pending in this Court
 24 and agreed to refile in state court. Dkt. 12, Case No. 3:20-cv-3241.

25
 26 ³ Three separate class actions asserting nearly identical allegations and claims against The Regents have also been
 27 filed in California state courts. *See Stoffel v. The Regents of the University of California and Does 1-100 Inclusive*,
 28 Case No. 20STCV14991 (Cal. Sup. Ct.) (filed April 16, 2020); *Mueller v. The Regents of the University of*
California, Case No. 20-CIV-01942 (Cal. Sup. Ct.) (filed May 6, 2020); *Funkhouser v. The Regents of the University*
of California, Case No. RG20061076 (Cal. Sup. Ct.) (filed May 12, 2020).

Because Plaintiffs' counsel has insisted on proceeding with the Motion on the original schedule, the Regents has no choice but to respond to it pursuant to Local Rule 7-3 and therefore makes this special appearance for that purpose. The Regents expressly does not waive its Eleventh Amendment immunity rights and reserves its right to seek to dismiss all three actions on immunity and subject matter jurisdiction grounds. To conserve judicial resources, the Regents submits that these threshold jurisdictional questions should be resolved first. If, however, the Court prefers to address the Motion now, The Regents takes no position regarding consolidation and appointment of interim class counsel. As to bifurcation, it is unclear what rule Plaintiffs purport to be invoking, as their one-paragraph contention is devoid of any legal citation. If the bifurcation request pertains to class certification or trial, it is plainly premature; if Plaintiffs seek dual-tracking for all pre-trial purposes, Plaintiffs have failed to meet their burden. They have made no showing—nor even attempted to—that splintering the issues for purposes of discovery and pretrial proceedings would result in efficiency gains.

II. RELEVANT FACTS

On April 27, 2020, Plaintiff Claire Brandmeyer filed a class action against The Regents in this Court, asserting claims for breach of contract, unjust enrichment, and conversion in an effort to secure the return of service fees and campus-based fees. Dkt. 1, Case No. 20-cv-2886. The next day, Plaintiff Noah Ritter filed a separate class action against The Regents in this Court. Dkt. 1, Case No. 20-cv-2925. The *Ritter* complaint also advances claims for breach of contract and unjust enrichment but, unlike *Brandmeyer*, it seeks a return of tuition as well as fees. The *Ritter* complaint also asks that the Court create tuition and fee subclasses. *Id.* Plaintiff Matias Lee filed the third class action complaint in this District on May 12, 2020, which, like the *Ritter* complaint, sought some form of pro-rata return of tuition and fees. Dkt. 1, Case No. 20-cv-3241.

On May 14, 2020, Plaintiffs Brandmeyer and Ritter filed the Motion. Mot. 1-23. In so doing, Plaintiffs appear to have bypassed procedural requirements under the local rules that require cases be deemed related before counsel may move to consolidate them. *See* Local Rule 3-12(b).

1 In the interest of avoiding unnecessary motion practice, The Regents conferred with
 2 counsel for Plaintiff Brandmeyer on May 20, 2020, explaining that the Regents intends to assert
 3 Eleventh Amendment immunity, and further explaining that subject matter jurisdiction is
 4 lacking—a position that should come as no surprise to Plaintiffs’ counsel given that counsel for
 5 Ritter themselves affirmatively proposed dismissing and refileing in state court. *See* Declaration
 6 of Karen Johnson-McKewan in Support of Defendant’s Response to Plaintiffs’ Motion for
 7 Consolidation, Bifurcation, and Appointment of Interim Class Counsel for the Fee Track and
 8 Tuition Track (“Johnson-McKewan Decl.”) at ¶¶ 4, 6. Given the settled jurisprudence on this
 9 issue, The Regents asked that Plaintiff Brandmeyer simply withdraw her federal lawsuit or, at a
 10 minimum, delay hearing the Motion until after resolution of The Regents’s forthcoming motion to
 11 dismiss. Johnson-McKewan Decl. at ¶ 4. On May 22, 2020, counsel in *Brandmeyer* declined the
 12 request and, without citing any legal authority, “strongly suggest[ed] that [the Regents] ...
 13 consent[] to federal jurisdiction, which is where we believe we’re ultimately going to stay.”
 14 Johnson-McKewan Decl. at ¶ 5.

15 On May 27, 2020, The Regents also conferred with counsel for Ritter and similarly
 16 informed Mr. Ritter’s counsel that it does not intend to waive Eleventh Amendment immunity,
 17 and that it is not subject to Class Action Fairness Act (“CAFA”) jurisdiction under 28 U.S.C. §
 18 1332(d)(5)(A) and, therefore, there is no subject matter jurisdiction. Johnson-McKewan Decl. at
 19 ¶ 7. Notwithstanding counsel’s prior recognition of The Regents’s Eleventh Amendment
 20 immunity and offer to dismiss and refile in state court, Mr. Ritter’s counsel indicated that he is
 21 reconsidering his offer and would provide his answer in a few days. *Id.* In response to the
 22 Regents’s request for legal authority supporting the proposition that the University could be
 23 compelled to litigate these cases in federal court, counsel offered none. *Id.*

24 By contrast, also on May 27, 2020, counsel for Plaintiff Lee informed The Regents that
 25 “Plaintiff is prepared to voluntarily dismiss the pending federal complaint, without prejudice[e],”
 26 in light of The Regents’s intent to move to dismiss the *Lee* action in this court for lack of subject
 27 matter jurisdiction. Johnson-McKewan Decl. at ¶ 8. That same day, Plaintiff Lee then filed a
 28

1 Notice of Voluntary Dismissal Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i)
 2 dismissing all causes of action in the *Lee* Complaint in this District against The Regents.⁴ *See*
 3 Dkt. 12, Case No. 3:20-cv-3241.

4 **III. ARGUMENT**

5 Because the University is immune from suit in this Court and subject matter jurisdiction is
 6 lacking under the CAFA, the Court should hold Plaintiffs' Motion in abeyance until the Court can
 7 rule on the threshold jurisdictional issues to be raised in The Regents's forthcoming motion to
 8 dismiss. That motion, which we anticipate filing on or before June 10, 2020 with a hearing date
 9 of July 20, 2020 (subject to the Court's availability), is highly likely to render the pending Motion
 10 moot. Some delay in resolving the current Motion is inevitable anyway, because without an order
 11 relating the cases (which ordinarily would have resulted from an Administrative Motion to
 12 Consider Whether Cases Should be Related pursuant to Local Rule 3-12(b)), the Court is not in
 13 the proper procedural position to hear the pending Motion.

14 If, however, the Court is inclined to hear the Motion, The Regents takes no position on
 15 consolidation and appointment of interim class counsel. The Regents does however oppose
 16 bifurcation. Plaintiffs have not articulated any grounds for bifurcation, much less satisfied their
 17 burden to demonstrate why proceeding in dual tracks from inception is likely to be more efficient.
 18 In all likelihood, it will prove *less* efficient.

19 **A. The Regents Intends to Move to Dismiss Based on Eleventh Amendment** 20 **Immunity and Lack of Subject Matter Jurisdiction under the Class Action** 21 **Fairness Act**

22 As an arm of the State of California, The Regents is immune from jurisdiction in federal
 23 court under the Eleventh Amendment. Controlling Ninth Circuit case law makes this abundantly
 24 clear. *See, e.g., Doe*, 519 U.S. 425; *Lawrence Livermore Nat'l Lab.*, 131 F.3d 836 (9th Cir.
 25 1997); *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); *Thompson v. City of Los Angeles*, 885
 26 F.2d 1439 (9th Cir. 1989); *VB Engineering v. University of California, Los Angeles*, 858 F.2d

27 ⁴ Plaintiff Lee's dismissal moots the relief requested in Plaintiffs' Motion with respect to the *Lee*
 28 action since that case is now terminated in this District; consequently, we do not discuss the *Lee*
 action further.

1 1394 (9th Cir. 1988); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Hong v. Grant*, 403
 2 F. App'x 236 (9th Cir. 2010); *Lafreniere v. Regents of Univ. of Cal.*, 255 F. App'x 275 (9th Cir.
 3 2007); *Feied v. Regents of Univ. of Cal.*, 188 F. App'x 559 (9th Cir. 2006); *Ellis v. City of San*
 4 *Diego, Cal.*, 176 F.3d 1183 (9th Cir. 1999). The Regents does not intend to waive immunity
 5 here.

6 In addition, aside from immunity, the *Brandmeyer* and *Ritter* complaints lack subject
 7 matter jurisdiction under CAFA. 28 U.S.C. § 1332(d)(5) states that CAFA—the sole asserted
 8 basis for subject matter jurisdiction—does not apply where, as here, “the primary defendants are
 9 States, State officials, or other governmental entities against whom the district court may be
 10 foreclosed from ordering relief.” As the Ninth Circuit has explained, “satisfaction of §1332(d)(5)
 11 serves as a prerequisite, rather than as an exception, to jurisdiction under §1332(d)(2).” *Serrano*,
 12 478 F.3d at 1021 n.3. Thus, subject matter jurisdiction would not exist even if the University
 13 chose to waive its Eleventh Amendment immunity. *See Kendrick v. Conduent State & Local*
 14 *Sols., Inc.*, 910 F.3d 1255, 1260 (9th Cir. 2018) (“In deciding whether the governmental entity
 15 exception applies, however, the existence or waiver of immunity is not the issue; the only issue is
 16 whether the entity is such that a claim of immunity *may* be made.” (emphasis added.) Because
 17 The Regents is a governmental entity against which federal courts may not order relief, the
 18 district court lacks subject matter jurisdiction in these cases. *See, e.g., Gonzalez v. Thaler*, 565
 19 U.S. 134, 141 (2012) (“When a requirement goes to subject-matter jurisdiction, courts are
 20 obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.
 21 Subject matter jurisdiction can never be waived or forfeited.”)

22 Because there is no jurisdictional basis for these cases to proceed in federal court, this
 23 Court should withhold ruling on this Motion pending resolution of The Regents’s forthcoming
 24 motion to dismiss (or proceed *sua sponte* to dismiss *Brandmeyer*).

25 **B. Plaintiffs’ Motion Is Procedurally Deficient**

26 Plaintiffs’ Motion is procedurally improper. Pursuant to Local Rule 3-12(b), before filing
 27 a motion to consolidate, a party “must promptly file in the lowest-numbered case an
 28

Administrative Motion to Consider Whether Cases Should be Related.”⁵ Before doing so, the would-be moving party must meet and confer with other counsel in an effort to reach a stipulation. *Id.*; *see also* Local Rule 7-11. If the motion is filed and granted, the Clerk will “reassign all related higher-numbered cases to that Judge.” Local Rule 3-12(f)(3). At that point, a single judge is positioned to rule across them.

Because Plaintiffs bypassed the requirement of relating the cases, they remain splintered between two judges—the *Brandmeyer* action is pending before this Court, and the *Ritter* action is pending before Magistrate Judge Spero.⁶ This Court is thus not positioned to grant the requested relief. It is authorized to rule in *Brandmeyer* only. Accordingly, Plaintiffs’ Motion should be denied, or the Court should defer ruling until it is positioned to rule in both the *Brandmeyer* and *Ritter* cases.

C. The Regents Takes No Position on Consolidation

The Regents takes no position on Plaintiffs’ request for consolidation, including the purported bases for consolidation.

D. Plaintiffs Fail to Show That Bifurcation Is Warranted

Somewhat paradoxically, at the same time they seek consolidation, Plaintiffs ask that the Court bifurcate the case into two “tracks”—a fee track and a tuition track. Plaintiffs offer no legal authority for the request. It is at best premature, and likely pointless.

Bifurcation typically arises in the context of discovery or trial. *See, e.g.*, 3 Newberg on Class Actions §§ 10:7, 10:8 (5th ed.)). It is discussed most frequently in terms of *staggered* proceedings—for instance, proceeding with class discovery before merits discovery, or having a liability phase before a damages phase. *Id.* The efficiency gains in the former context arise because “if a case is not certified as a class action, it will effectively be over; thus, having full merits discovery prior to the certification motion may be wasteful,” *id.* at § 10:7, and, in the latter,

⁵ The Regents have not filed an administrative motion pursuant to Local Rule 3-12(b), as it does not intend to waive immunity and because subject matter jurisdiction is lacking. As noted, it will instead file motions to dismiss.

⁶ The parties in *Ritter* have been given until June 2, 2020 to file a consent or declination to magistrate jurisdiction. *See* Case No. 20-cv-02925 (ECF No. 8) (May 19, 2020).

1 because a “determination of one issue could wholly eliminate the need to try another complicated
 2 or time-consuming issue,” *id.* at § 10:8; *see also, e.g., Jinro America Inc., v. Secure Invs., Inc.*,
 3 266 F.3d 993, 998 (9th Cir. 2001) (discussing permissibility of bifurcation of “a trial to permit
 4 deferral of costly and possibly unnecessary proceedings pending resolution of potentially
 5 dispositive preliminary issues”); *Drennan v. Maryland Casualty Co.*, 366 F. Supp. 2d 1002, 1007
 6 (D. Nev. 2005) (“Bifurcation is particularly appropriate when resolution of a single claim or issue
 7 could be dispositive of the entire case.”).

8 Plaintiffs’ request for bifurcation here appears to pursue something very different: they
 9 seek to splinter the cases into two different *issues-based tracks* operating in parallel from the
 10 outset. Plaintiffs offer no authority to support such a peculiar proposal.⁷ We have been unable to
 11 locate even a single prior case in the Northern District of California that has been bifurcated this
 12 way. By highlighting that the *Ritter* action proposes “splitt[ing] into two distinct classes: a
 13 Tuition Class and a Fees Class,” Mot. at 7:18-19, perhaps Plaintiffs are asking that this Court in
 14 effect rely on Federal Rule of Civil Procedure 23 and certify two classes from the outset. Doing
 15 so would put the cart before the horse. Subclassing can only occur *after* a rigorous review of a
 16 class certification motion under Rule 23. Accordingly, any such request is premature. If what
 17 Plaintiffs seek instead is bifurcation under Federal Rule of Civil Procedure 42(b), that rule applies
 18 to bifurcation for *trial*. This case was just filed. It remains to be seen whether trial will be
 19 necessary, much less what form it should take.

20 If what Plaintiffs are attempting to request is an expanded application of Rule 42(b) to
 21 support bifurcation from inception, the request is misguided. To make the requisite showing
 22 under Rule 42(b), Plaintiffs bear “the burden of proving that bifurcation will promote judicial
 23 economy and avoid inconvenience or prejudice to the parties.” *Spectra-Physics Lasers, Inc. v.*
 24 *Uniphase Corp.*, 144 F.R.D. 99, 101 (N.D. Cal. 1992). Plaintiffs do not even try to meet this

25
 26 ⁷ In denying a similar request for bifurcation of two separate claims, one court explained, “[t]his is an unusual
 27 motion.... Plaintiff [] chose to bring his two claims together in one action, and now seeks to essentially undo that by
 28 asking the Court to bifurcate the claims.” *Humenuik v. T-Mobile USA, Inc.*, No. 1:14-CV-02002, 2015 WL 3397861,
 *1 (N.D. Ohio May 26, 2015) (“If bifurcated, the Court and parties would be faced with two rounds of dispositive
 briefing, two parallel tracks of discovery, and potentially two trials.”)

1 standard. They do not propose staggered proceedings that might theoretically be more efficient,
 2 where, for example, resolution of one issue at a first trial could be dispositive of the entire case—
 3 for instance, disposition of the “Fee Track” issues would dispose of the “Tuition Track” issues, or
 4 *vice versa*. Rather, they appear to propose *simultaneous* discovery, *simultaneous* motion practice,
 5 and *simultaneous* trials. The only efficiency argument they make in support of such prolonged
 6 dual-tracked proceedings is the conclusory assertion that “these claims rely on different facts and
 7 are susceptible to different defenses.” Mot. at 7:10-11. Under any standard, such a bare
 8 contention is inadequate to meet Plaintiffs’ burden.

9 If anything, Plaintiffs’ proposed bifurcation is almost certain to create gross inefficiencies,
 10 as it would result in duplication of efforts with regard to discovery, motion practice, and trial
 11 given that many proposed class members could fall into the “Fee Track” as well as the “Tuition
 12 Track.” Those class members should not have to participate in discovery and trial twice. Nor
 13 should the Regents. *See, e.g., Spectra—Physics Lasers, Inc.*, 144 F.R.D. at 101 (“The court finds
 14 that logic dictates that holding two trials, as opposed to one, will inevitably cause delay in
 15 resolution of the instant case.”).

16 Finally, Plaintiffs’ request to bifurcate is internally inconsistent with the very arguments
 17 they advance in support of consolidation. For consolidation, they insist these actions “involve a
 18 common question of law or fact” and “overlapping claims against the same defendant.” Mot. at
 19 3:11-24. If the suits assert “overlapping claims” and “overlapping allegations” as Plaintiffs
 20 suggest (Mot. at 3:19-21), then bifurcation is not appropriate. *See Hunter v. City and County of*
 21 *San Francisco*, No. 11–4911 JSC, 2012 WL 4831634, at *10 (N.D. Cal. Oct. 10, 2012) (“Where
 22 an overlap of factual issues exists between the claims, courts are reluctant to bifurcate the
 23 proceedings.”)

24 Because Plaintiffs have not come close to meeting their burden to show that bifurcation
 25 would promote convenience or judicial or party economy, the Court should decline to bifurcate.

26 **E. The Regents Takes No Position Concerning Appointment of Interim Class**
 27 **Counsel**

28 As discussed above, The Regents believes the instant cases do not belong in federal court.

1 In the event the Court believes otherwise, the Regents takes no position concerning the
 2 appointment of interim class counsel, except to reiterate that interim class counsel should not be
 3 separately appointed for a “Fee Track” and “Tuition Track” because those tracks should not be
 4 created.

5 **IV. CONCLUSION**

6 For the reasons stated herein, Plaintiffs’ Motion should be held in abeyance pending a
 7 ruling on The Regents’s forthcoming motion to dismiss, which it will file by June 10, 2020 (with
 8 a prospective hearing date of July 20, 2020). To the extent the Court is inclined to rule on
 9 Plaintiffs’ Motion at this time, it should deny Plaintiffs’ request for bifurcation.

10 Dated: May 28, 2020

KAREN G. JOHNSON-MCKEWAN
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14 By: /s/ Karen G. Johnson-McKewan
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